

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHEN BROWN, an individual; and
GARRETT PATTERSON, an individual,

Plaintiffs,

v.

CITY OF LAKEWOOD, a municipal
corporation; DARRELL MOORE, and
individual; and MICHAEL
McGETTIGAN, an individual,

Defendants.

CASE NO. C15-5403RJB

SUPPLEMENTAL ORDER ON
MOTIONS IN LIMINE

This matter comes before the court on the parties' Motions in Limine attacking the proposed testimony of experts in standards of police practice. Plaintiffs' Motion in Limine is at Docket 39, Paragraph 2.8, regarding the testimony of Thomas Ovens. Defendants' Motion in Limine is at Docket 37, and attacks the testimony of D.P. Van Blaricom in Numbers 1 and 2.

I. RULINGS

Both Mr. Ovens and Mr. Van Blaricom are qualified to render opinion testimony pursuant to Evidence Rule 702 in the area of standards of police practice, and may provide opinion testimony at trial on those issues regarding unlawful entry, unlawful seizure/arrest, excessive force, false arrest and false imprisonment, and assault and battery claims as set forth in

1 the court's Order on Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion
2 for Partial Summary Judgment (Dkt. 33 at page 17).

3 In regard to defendants' Motion in Limine No. 2, "[E]vidence or argument regarding
4 newly-minted opinions by D.P. Van Blaricom on *Monell* issues," that motion should be
5 GRANTED. Mr. Van Blaricom cannot testify regarding *Monell* based opinions that were not
6 included in his expert report. On the other hand, as plaintiffs point out, all of the evidence in the
7 case and the opinions of the expert witnesses indirectly would apply to the *Monell* arguments.

8 II. OBSERVATIONS AND RULINGS

9 However, the court makes the following additional observations and rulings in regard to
10 these motions:

11 1. **Fact Finding.**

12 "An expert may base an opinion on facts or data in the case that the expert has been made
13 aware of or personally observed." Evidence Rule 703. In spite of that evidence rule, expert
14 witnesses cannot take it upon themselves to make findings on contested issues of fact. Both
15 expert witnesses in their reports (Ovens at Dkt. 16, Van Blaricom at Dkt. 20), have made
16 findings of fact on contested issues without indicating that they are only assuming the truth of
17 certain evidence. Expert witnesses are not finders of fact and cannot present opinions based on
18 findings they have made on contested issues. They can base their opinions on evidence they
19 have considered, provided it is made clear to the finders of fact, the jury, that the opinion is
20 based on the assumption that particular evidence is true. There may be a fine distinction, but it is
21 entirely inappropriate for any witness who was not an eyewitness to the events at issue, to come
22 into court and indicate that the witness believes the testimony of one witness or party over
23
24

1 another. Vouching for another witness is not allowed, whether done directly or indirectly. The
2 distinction can be managed by careful questioning at trial.

3 Also, at different places throughout the experts' reports, they each reach conclusions of
4 fact that may or may not be true, and may or may not be supported by the evidence in the case.
5 For example, in Mr. Ovens report at Paragraph 9, he recites that, "Officers are trained to observe
6 many indicators...." An example in Mr. Van Blaricom's report appears in Paragraph 10(a)(1)
7 that indicates, "They (police officers) are trained to know and understand...." There is no
8 reference in either report to what training these particular defendants have received, or to the
9 court's knowledge, where the factual conclusions regarding training comes from.

10 **2. Basis of Opinions.** Both experts, in their reports, refer to "the totality of the
11 circumstances" as a basis for their opinions and list some items that they find important in
12 reaching their opinions, but they do not connect their opinions to any authority except their own
13 experience. Both experts cite authorities in their reports. If opinions are based on authorities,
14 experts should be prepared to back up their opinions with those authorities. If opinions are based
15 only on the knowledge, skill and expertise of the witness, they should say so.

16 **3. Page Fifteen of Van Blaricom's report.** In regard to Paragraph 15 of the Van
17 Blaricom report (Dkt. 20), that long section appears to be advice to counsel regarding potential
18 cross examination of Mr. Ovens, and it contains many facts that are not within the proper scope
19 of the testimony of an expert witness.

20 **4. Standards.** In both reports, the expert witnesses have used different standards for
21 their opinions: A "reasonable officer" in Mr. Ovens' report, and "reasonable standards of care"
22 in Mr. Van Blaricom's report. Counsel should be careful in questioning the expert witnesses to
23 elicit responses that apply the correct standards.

III. CONCLUSION


The court is mindful that this opinion is not specific in many ways, and allows for adjustment in the way the opinions of the experts might be presented to the jury. Opinions to be presented at trial should be within the meaning and limitations of the experts' reports, even if questions and answers are couched in terms that are different than those in the reports.

To the foregoing extent, Plaintiffs' Motion in Limine at Docket 39, Paragraph 2.8, Parts A and B, and Defendants' Motion in Limine at Docket 37, Nos. 1 and 2, are GRANTED IN PART AND DENIED IN PART.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 12th day of August, 2016.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN
United States District Judge